

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a
Washington Limited Liability
Company; KENNETH EVANS; JOHN
WAYNE JONES; and JAMIE JONES,
individual resident of
Washington State,

Plaintiffs,

v.

SANDRA D. EVANS, an
individual not a resident of
Washington State,

Defendant.

NO. CV-07-314-EFS

**ORDER DENYING DEFENDANT EVANS'
MOTION TO DISMISS FOR LACK OF
FEDERAL QUESTION JURISDICTION**

A hearing occurred November 13, 2009, in the above-captioned matter in Richland, Washington. Plaintiffs Wapato Heritage, LLC ("Wapato Heritage"), Kenneth Evans,¹ John Wayne Evans, and Jamie Jones were represented by Bruce Johnston and Michael Arch. Mary Wynne appeared on Defendant Sandra Evans' behalf. Before the Court was Defendant's Motion to Dismiss for Lack of Federal Question Jurisdiction (Ct. Rec. [538](#)). Defendant Evans seeks dismissal under Federal Rule of Civil Procedure

¹ Kenneth Evans was present.

1 12(b) on the grounds that 1) the Complaint fails to state a federal
2 question and 2) the Court's assumption of jurisdiction will interfere
3 with tribal self-government. This Order serves to supplement and
4 memorialize the Court's oral finding that subject matter jurisdiction
5 exists based on a federal question.

6 **A. Timing of Motion**

7 Although Defendant asserted a subject-matter jurisdiction defense
8 in her answer, Defendant did not pursue this defense for approximately
9 two years. This is the first time the Court has had a defendant sit on
10 its subject matter jurisdiction argument until *after* the dispositive
11 motion filing deadline passed. The Court is bewildered by this strategy,
12 especially since it forced Defendant, along with Plaintiffs and the
13 Court, to expend time and money on discovery and other legal issues -
14 Defendant alone has spent over \$750,000 in attorneys fees and costs in
15 this action. (Ct. Rec. [538](#)-4 ¶ 12.)

16 Nonetheless, because subject-matter jurisdiction involves a federal
17 court's power to hear a case, a subject-matter-jurisdiction argument can
18 never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, 630
19 (2002). Accordingly, once Defendant advised that she was actively
20 challenging subject-matter jurisdiction in the fall 2009, the Court asked
21 the parties to brief and argue the matter. After reviewing the submitted
22 material and legal authority and hearing from counsel, the Court is fully
23 informed.

24 **B. Standard**

25 A federal court only has the "power that is authorized by Article
26 III of the Constitution and the statutes enacted by Congress pursuant

1 thereto." *Magana v. Commonwealth of the N. Mariana Islands*, 107 F.3d
2 1436, 1440 (9th Cir. 1997) (emphasis omitted) (quoting *Bender v.*
3 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). The basic
4 statutory grants of federal court subject-matter jurisdiction are
5 contained in 21 U.S.C. § 1331, which provides for federal-question
6 jurisdiction, and 21 U.S.C. § 1332, which provides for diversity of
7 citizenship jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 501
8 (2006). Here, the Court is only addressing whether the Complaint alleges
9 a federal question.

10 Federal-question jurisdiction exists when the plaintiff² pleads a
11 colorable claim "arising under the Constitution, laws, or treaties of the
12 United States." 28 U.S.C. § 1331. Case law has interpreted § 1331 to
13 include 1) a cause of action created by federal law or 2) a state-law
14 claim, which has - as an essential component - a federal law that creates
15 a cause of action or reflects an important national interest. See
16 *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 501 (2006); Erwin Chemerinsky,
17 *Federal Jurisdiction* 295 (Aspen Publishers 2007).

18 Defendant characterizes Plaintiffs' claims as state law breach of
19 contract claims and therefore contends that no federal question exists.
20 Although in its July 8, 2009 Order the Court was called to determine
21 whether Defendant breached the Settlement Agreement, which on its face
22 appears to be a state law claim, a deeper probe of Plaintiffs' claims
23 shows that a federal question exists.³ Critical to the Court's analysis

24
25 ² Jurisdiction cannot be based on a federal defense raised in the
26 answer. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1314 (9th Cir. 1982).

³ The Court is cognizant that it applied Washington law to
ORDER ~ 3

1 of Plaintiffs' claims is understanding the purpose of the Settlement
2 Agreement - the Settlement Agreement serves to alter the testate
3 distribution of William Wapato Evans' estate, which included Indian trust
4 property.

5 According to a federal statute, no will disbursing trust property
6 "shall be valid or have any force or effect unless and until it shall
7 have been approved by the Secretary of the Interior. . . ." 25 U.S.C.
8 § 373. See also *Cultee v. United States*, 713 F.2d 1455, 1459 (9th Cir.
9 1983) (recognizing that an Indian will as to trust assets is only valid
10 if approved by the Secretary of the Interior as required by 25 U.S.C. §
11 373); *Hanson v. Hoffman*, 113 F.2d 780 (10th Cir. 1940) (recognizing that
12 Indian wills must receive approval from the Secretary of the Interior).
13 A federal regulation allows the parties to an Indian trust probate to

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16 _____
16 interpret the Settlement Agreement. (Ct. Rec. 382 p. 9 n.10.) The Court
17 concludes it was appropriate to utilize these interpretation standards
18 given the parties' implicit agreement to apply Washington law,
19 notwithstanding the general rule that "federal law supplies the standards
20 for determining valid execution and proper interpretation of wills." *In*
21 *re Estate of Covington*, 450 F.3d 917, 924 (9th Cir. 2006). Regardless,
22 the Court complied with federal law interpretation principles, which
23 requires the Court to determine the parties' intent at the time of the
24 Settlement Agreement based upon a review of the entire Settlement
25 Agreement. See, e.g., *Estate of Bruning v. Comm'r of Internal Revenue*,
26 888 F.2d 657, 659 (10th Cir. 1989).

1 settle the matter. 43 C.F.R. 4.207.⁴ The settlement, however, *must* be
2 approved by the Secretary of the Interior. *Id.*

3 This is what occurred here. The parties to the will desired to
4 settle. After holding hearings, Department of Interior Office of
5 Hearings and Appeals (OHA) Judge M.J. Stancampiano, entered an Order
6 approving the Settlement Agreement. The order specified, "[t]his order
7 will be construed as any other order of distribution establishing title
8 in heirs and beneficiaries and will not be construed as a partition or
9 sale transaction within the provisions of 25 CFR part 152."

10 After Judge Stancampiano's order approving the Settlement Agreement
11 began final, the estate was to be distributed in accordance with the
12 agreement. The Settlement Agreement, however, called for future action
13 by Defendant; as the Court found in its July 2009 Order, Defendant has
14 failed to perform agreed-upon obligations. Upon realizing that Defendant
15 was failing to perform her Settlement Agreement obligations, Plaintiffs
16 sought the assistance of the OHA. OHA Judge Lynch, who took over the
17 probate matter from OHA Judge Stancampiano, determined that OHA did not
18 have the federal regulatory authority to enforce the Settlement
19 Agreement. (Ct. Rec. [331](#) ex. E & ex. F.)

20 In light of 25 U.S.C. § 373 and the federal regulations implementing
21 this statute, particularly 43 C.F.R. § 4.207, the Court concludes that
22 Plaintiffs' claims present a federal question. It is clear that the
23 Settlement Agreement's validity is dependent on federal law. *In re*
24 *Estate of Covington*, 450 F.3d at 924 (finding that execution and

25
26 ⁴ In 2008, the substance of this regulation was moved to 43 C.F.R.
§ 30.150.

1 interpretation of Indian will disposing of trust property is question of
2 federal not state law). Further, a federal proceeding is necessary to
3 enforce the approved Settlement Agreement because the OHA lacks
4 enforcement authority. The Court highlights that it is not reviewing OHA
5 Judge Stancampiano's order approving the Settlement Agreement, but rather
6 is being called to enforce the approved Settlement Agreement. *C.f.*
7 *Kakaygeesick v. Salazar*, - F. Supp. 2d - , 2009 WL 2916854 (D. Minn.
8 2009). Also, this federal enforcement action of the OHA-approved
9 Settlement Agreement does not interfere with tribal self-government.

10 Now that subject-matter jurisdiction is resolved, the Court is
11 prepared to enter judgment in Plaintiffs' favor. Consistent with the
12 Court's prior rulings, Plaintiffs are to receive 35% of the MA-10
13 revenues for the agreed-upon five-year period. In addition, Plaintiffs
14 will receive prejudgment interest at the federal rate, as well as
15 reasonable attorney fees and costs.⁵ The Court, however, will defer
16 entry of judgment as the parties have indicated they wish to engage in
17 mediation.

20 ⁵ Assuming that the other quarterly 35% revenues since 2006 are
21 similar to the amount deposited with the registry of the Court in the
22 fall of 2009 (\$85,887.38), Plaintiffs could be awarded judgment of more
23 than a million dollars plus prejudgment interest. As for an award of
24 attorneys fees and costs to Plaintiffs, the Court recalls that Defendant
25 has incurred over \$750,000 in attorneys fees and costs for herself and
26 Dan Gargan. (Ct. Rec. [538](#)-4 ¶ 12.)

1 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion to Dismiss
2 for Lack of Federal Question Jurisdiction (**Ct. Rec. [538](#)**) is **DENIED**.

3 IT IS SO ORDERED. The District Court Executive is directed to enter
4 this Order and provide copies to counsel.

5 **DATED** this 23rd day of November 2009.

6
7 S/ Edward F. Shea

8 EDWARD F. SHEA

9 United States District Judge

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